No. 53.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOSEPH ALEXANDER, ET AL., *Plaintiffs in Error*,

vs.

THE UNITED STATES, *Defendant in Error.*

DEFENDANT'S BRIEF.

FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF IDAHO.

FREMONT WOOD,
United States Attorney for Idaho,
Attorney for Defendant in Error.

IN THE

Circuit Court of Appeals for the Ninth Circuit.

JOSEPH ALEXANDER, et al.,
Plaintiffs in Error,
vs.
THE UNITED STATES,
Defendant in Error.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

This case should be dismissed.

1. Because a writ of error will not lie to review any final decision unless the same is sued out within six months after the entry of the judgment sought to be reviewed.

2. Because a writ of error will not lie to review the decision of a United States Circuit or District Court, granting or overruling a motion for a new trial.

STATEMENT.

The case was tried at the November term, 1888, by the First District Court of Idaho Territory, sitting for the trial of United States cases. The judgment was entered for the full amount of the penalty of the bond sued upon, November 24th, 1888, in accordance with the verdict of the jury rendered under direction of the Trial Court. On the 15th day of April, 1889, the Trial Court took under consideration a motion for a new trial, but the same was not decided until the 27th day of November, following, when the trial judge signed an order overruling the motion. No further action was taken until the 19th day of May, 1891, when the plaintiffs in error made a motion in the United States District Court for the District of Idaho, to set aside the order made by the trial judge of the Territorial District Court overruling the motion for a new trial. On the 25th day of May, 1891, the District Court sustained the latter motion, setting aside said order. On the 14th day of

December, following, the District Court overruled said motion for a new trial. The only exceptions saved upon the trial of the case were embraced in plaintiffs' statement on motion for a new trial. No exceptions were settled upon the trial of the case, either by the Territorial Trial Court, (or by the United States District Court after making the order overruling the motion for a new trial) upon which either the final judgment of the Territorial Court, or the decision of the United States District Court, could be reviewed, assuming that the latter was a final decision, within the meaning of the Sixth section of the Appellate Court act. In fact, it is difficult to determine from the record herein, whether plaintiffs in error seek only to review the order of the District Court overruling the motion for a new trial, or whether they seek to review both the final judgment entered in November, 1888, together with the order overruling the motion for a new trial.

BRIEF.

1. An appeal taken to the Circuit Court of Appeals more than six months after entry of the judgment appealed from must be dismissed under paragraph 11, Appellate Court, Act of 1891.

Conliette, et al., vs. Thomason, et al., decided by Circuit Court of Appeals, 5th Circuit, 50 Fed. Rep., 787.

2. A writ of error will not lie, under the provisions of the Appellate Court Act, to review the decisions of a United States Circuit or District Court, granting or overruling a motion for a new trial, because such motion is always addressed to the sound discretion of the trial judge.

Atchison T. & S. F. R. Co., vs. Howell, (Circuit Court of Appeals, 8th circuit) 49 Fed. Rep., 206.
McClellan et al., vs. Pyeatt et al., (Circuit Court of Appeals, 8th circuit, 50 Fed. Rep., 688) citing.
Doswell vs. De La Lanza, 20 Howard, 29.
Mulhall vs. Keenan, 18 Wall., 342.
Railway Company vs. Twombly, 100 U. S., 78.
Railway Company vs. Heck, 102 U. S., 120.

That error will not lie to review the decision of a Cir-

cuit or District Court overruling a motion for a new trial has been repeatedly decided by the Supreme Court.

Terra Haute and I. Ry. Company vs. Strubble, 109 U. S., 381.

Missouri Pacific Railway Co. vs. Chicago and A. R. Co., 132 U. S., 139.

Ayers vs. Watson, 137 U. S., 584.

Fishburn vs. Chicago, M. & St. P. Ry. Co., 137 U. S., 60.

Fitzgerald and Mallory Const. Co. vs. Fitzgerald, 137 U. S., 98.

In Atchison T. & S. F. R. Co. vs. Howard (supra,) the Appellate Court says:

"The first error relied upon in this Court is the refusal of the lower court to grant the plaintiff in error a new trial. Counsel for the railroad company claim to have been surprised by the testimony of the witness Sturdy above referred to, and on that ground they asked the Circuit Court to award a new trial, which motion was denied. It is sufficient to say of the alleged error that we cannot notice it. The granting of a motion for a new trial is a matter resting in the sound discretion of the trial judge, and we are not authorized to review its action in that regard." Citing–

Railroad Company vs. Horst, 93 U. S., 291–301.

Newcomb vs. Wood, 97 U. S., 581.

In McClellan et al., vs. Pyeatt et al., (supra,) the following language was used by the Court:

Suggestion is made that there was a motion for a new trial and that that motion specifies particularly the paragraphs of the Court's charge to the jury intended to be excepted to and that as that was an exception to the overruling of the motion for a new trial, all errors particularly set out in the motion are sufficiently saved. *This is a misconception of the office and effect of a motion for a new trial in the Courts of the United States. In these Courts the motion for a new trial is designed to invoke the judgment of the trial court on the alleged errors set out in the motion, but the ruling of the trial court on the motion cannot be assigned for error and neither this Court nor the Supreme Court of the United States will treat the motion for a new trial as a sufficient bill of exceptions or assignment of errors. Its office and functions are limited to the trial Court.*"

In Fishburn vs. Chicago, M. & St. P. Ry. Co., 137 U. S., 60, cited above, the Court says:

"The only exception in respect to which plaintiff assigns error here was to the overruling of her motion for a new trial, which is not the subject of exception according to the practice of the Courts of the United States. Various objections to the charge of the Court were set out as grounds for the motion for a new trial, but it nowhere appears that exceptions were taken to any of these matters save as involved in the overruling of that motion."

In Ayres vs. Watson, 137 U. S., 584, the Court, before considering the specifications of error, says:

"Before examining the errors assigned in relation to the charge and refusals to charge as requested, the third assignment of error may be disposed of. This was the refusal of the Court to grant a new trial and as to that we have only to repeat what we have so often endeavored to impress upon counsel that error does not lie for granting or refusing a new trial."

In Indianapolis and St. L. R. R. Co. vs. Horst, 3 Otto, 301, in referring to the right to review an order overruling a motion for a new trial, the Court says:

"In the Courts of the United States such motions are addressed to their discretion. The decision, whatever it may be, cannot be reviewed here. This is a rule of law established by this Court, and not a mere matter of proceeding or practice in the Circuit or District Courts."

From the foregoing it clearly follows that an order either sustaining or overruling a motion for a new trial is not a final decision reviewable in this Court under the Sixth Section of the Act of March 3d, 1891.

Again, the errors upon which the plaintiff relies are such only as can be considered by this Court when embraced in a bill of exceptions. No such bill of exceptions has been settled and filed. No exceptions were settled and allowed at the trial upon which the final judgment could be reviewed. The only record of the proceedings upon the trial which appears to have been settled by the trial Court was plaintiffs' so-called statement of case upon motion for a new

trial, which nowhere shows that the same was settled by the Trial Judge, except the certificate of the Clerk of the Territorial Court made on the 9th day of December, 1889, but this statement was only for use upon the motion for a new trial and cannot be treated here as a sufficient bill of exceptions or assignment of errors. Its office and functions are limited to the Trial Court.

McClellan et al., vs. Pyeatt et al., (Circuit Court of Appeals,) 50 Fed. Rep., 686.

Richmond & Danville R. R. Co. vs. McGee et al., (Circuit Court of Appeals, 4th Circuit,) 50 Fed. Rep., 906.

Fishburn vs. Chicago, M. & St. P. Ry. Co., 137 U. S., 60.

BRIEF UPON THE MERITS.

An examination of the record readily discloses the fact that no error was committed either by the Territorial Trial Court, or by the United States District Court, when overruling the motion for a new trial.

1. Plaintiffs' first and second assignments of error can not be considered for the reason that nothing appears in the record or in the so-called statement on motion for a new trial, showing the proceedings of the Court thereon.

2. Plaintiffs' third assignment of error is not well taken.
   (a) The challenge came too late.
   (b) No challenge to the panel was authorized by the statute. Section 4379, R. S. Idaho Territory, then in force, limited challenges to individual jurors
   (c) The same statute required all defendants to join in a challenge before it could be entertained.

Section 4379, R. S. of Idaho (Laws of 1887) is as follows: "Either party may challenge the jurors, but where there are several parties on either side, they must join a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they

must be taken by the parties alternately, commencing with the plaintiff."

3. Plaintiffs' fourth assignment of error needs no consideration whatever.

4. The questions asked of the witness Kress related only to the circumstances connected with the service of notices of demand upon the defendant sureties, and were entirely proper as preliminary to the offering of the written demands afterwards introduced and read to the jury.

5. Plaintiff's "Exhibit A," the admission of which is a part of plaintiff's sixth assignment of error, was a certified copy of the bond, the making of which is alleged in the complaint and admitted by the answer; while "Exhibit B," the admission of which is also assigned as error, was a certified copy of the demand made by the witness Kress upon each of the bondsmen for the sum of $20,949.46, the amount due upon the money order account of the principal on the bond. To show that this evidence was clearly admissible needs no argument or authority.

6. "Exhibits D and E," the admission of which is assigned as error in plaintiffs' seventh assignment, were certified transcripts from the books of the proper accounting officers of the Treasury Department of the account of the principal upon the bond, as the same appeared upon the books of the Treasury Department. The admission of these transcripts of account was objected to on the ground that a demand for "items of account" had been served upon the attorney for the United States, and that copies of these transcripts of account had not been furnished said defendants or their attorneys before the trial of the case.

This objection was overruled by the Court on the ground in part that the suit was upon a bond, not upon an account, for which reason the plaintiff could not be compelled under the statute to furnish a copy of the items of account.

This demand was made evidently under Section 4209,

Revised Laws of Idaho, (Statutes of 1887) which is as follows:

"It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The Court, or the Judge thereof, may order a further account when the one delivered is too general or is defective in any part."

It is manifestly apparent from an examination of this statute that a suit for the penalty of a bond is not a suit upon an account within the provisions of the foregoing section, and the following suggestion was very properly made by the District Court when considering this assignment of error in overruling the motion for a new trial. "While in this section, the account as it stood between the Government and Hibbs was the assertive evidence in the case, and in a sense is the basis of the action, yet this is not a suit upon an account, but is directly upon the bond and for the amount of the penalty of such bond."

If the defendants desired an inspection of the transcripts of account, the admission of which was authorized by the statute to prove the contents thereof, Section 4875 of the R. S. of Idaho (Laws or 1887) clearly provided for the inspection thereof. This section reads as follows:

"Any Court in which an action is pending, or the judge thereof, may upon notice order either party to give to the other, within a specified time, an inspection, or copy, or permission to take a copy of entries of account in any book, or of any document or paper in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the Court may exclude the book, document or paper from being given in evidence, or if wanted as evidence by the party complying, may direct the jury to presume them to be such as he alleges them to be; and the Court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness."

7. Plaintiffs' eighth and ninth assignments of error can be considered together. In their eighth assignment they allege error in sustaining the objections to the testimony

of witness W. F. Kettenbach, and in their ninth assignment, in sustaining the objections to the testimony of the witness J. W, Reid. The testimony of neither of these witnesses was competent to establish the fact that Hibbs, the principal upon the bond sued on, was entitled to any other credits than those appearing in the certified transcripts of account offered in evidence on the part of the United States.

Section 951 clearly points out what course must be pursued by a party claiming a credit. The portion of the section applicable to the facts in this case is as follows:

"In suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial except such as appear to have been presented to the accounting officers of the Treasury for their examination, and to have been by them disallowed in whole or in part."

And parole evidence is not admissible to prove the presentation and disallowance of the credit claimed.

In United States vs. Gillman, 9 Wallace, 429, it was decided that such claims of credit must be presented to the proper auditing officers for their examination and action; and that such fact must be made to appear by the transcripts from the books of Government, and that "parole evidence is wholly admissable. Evidence from the books of the Treasury in some form is indispensible."

In overruling the motion for a new trial the opinion filed by the District Judge contains the following statement with reference to the admissibility of this testimony:

"At the trial the defendants failed to produce any such evidence, but asked to show the presentation and disallowance of the claimed credits by parole proof of the conversation had with some of the accounting officers of the Government, aided by a memorandum of figures taken or made at the time, and not by any certified transcript of books."

"But an inspection of the money order account of the said Hibbs, which is included in the record of this case, shows upon its face that the credit of $9,702.50, claimed by plaintiffs in error, had been credited to this account be-

fore the account was closed and the balance of upwards of twenty thousand dollars certified as due and unpaid."

8. Plaintiffs' tenth assignment alleges error in the Trial Court, instructing the jury to bring in a verdict for the United States. The evidence introduced in behalf of the United States established a case under the statute for the plaintiff. The defendant introduced no legal testimony in any way rebutting the evidence offered for the United States, and the Trial Court properly instructed the jury to find for the plaintiff the full amount of the penalty of the bond.

"This is the correct practice where there is no evidence at all to contradict or vary the case made by the plaintiff."

Hendricks vs. Lindsley, 93 United States, 43.
Bevans vs. United States, 13 Wall., 57.
Walbrun vs. Babbitt, 16 Wall.. 577.

9. Plaintiffs' eleventh assignment of error that "The Court erred in overruling the motion of plaintiffs in error for a new trial on the assignments of error above set out" has been fully considered in the former part of this brief.

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